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BEFORE THE ARIZONA CORPORATION COMMISSION

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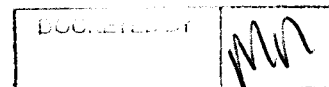
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ARIZONA CORPORATION COMMISSION
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Arizona Corporation Commission

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OCT -2 2008



PAC-WEST TELECOMM, INC.,

Complainant,

vs.

QWEST CORPORATION,

Respondent.

DOCKET NO. T-01051B-05-0495
DOCKET NO. T-03693A-05-0495

DECISION NO. _____

PROCEDURAL ORDER

BY THE COMMISSION:

On July 25, 2008, Qwest Corporation ("Qwest") filed a "Notice of Final Order and Remand" and a Motion for Judgment Pursuant to Mandate ("Motion") in the above-captioned dockets. Qwest had filed an action in the United States District Court for the District of Arizona ("District Court") seeking declaratory and injunctive relief from an Order of the Arizona Corporation Commission ("Commission") in Decision No. 68820. The District Court issued its Order in that action on March 6, 2008. Qwest states the District Court's order was not appealed and has become final as between Qwest and Pac-West.¹

By its Motion Qwest seeks to have the Commission vacate provisions of Decision No. 68820 which Qwest claims were enjoined by the Order of the District Court and requests the Commission to order Pac-West Telecomm, Inc. ("Pac-West") to refund Qwest the amount of \$1,849,153.22, which Qwest had paid to Pac-West pursuant to Decision No. 68820.

On August 11, 2008, Pac-West filed a Response to Qwest's Motion. Pac-West asserts that the relief Qwest seeks in its Motion is inconsistent with the District Court's Order. Pac-West claims that

¹ The District Court Order addressed two Commission Decisions, the second one involving a complaint brought by Level 3 Communications against Qwest. Level 3 has appealed the order to the Ninth Circuit Court of Appeals.

1 the District Court's Order requires the Commission to determine the most appropriate compensation
2 regime for Virtual NXX ("VNXX") traffic before determining which party prevails in the dispute.
3 Pac-West proposed a briefing schedule for resolving the issue.

4 On August 22, 2008, Qwest filed a Reply to Pac-West's Response. Qwest argues that the
5 Commission must first address and amend those portions of Decision No. 68820 that were vacated by
6 the District Court's Order, and only then would it be appropriate to decide how the Commission
7 should deal with VNXX. Qwest argues that the Commission may not commingle the resolution of
8 the Qwest/Pac-West dispute with a "generic" proceeding on the VNXX issue. Qwest argues that
9 even if the Commission decides not to issue an immediate order dismissing Pac-West's complaint
10 and ordering a refund, the Commission must still vacate the enjoined provisions of Decision No.
11 68820 and restore the status quo. Qwest states that any further proceedings on Pac-West's original
12 complaint and Qwest's counterclaims must equate to a new trial, and disagrees that the matter should
13 be submitted for resolution on briefing alone.

14 By Procedural Order dated September 4, 2008, a Procedural Conference was scheduled for
15 September 25, 2008, to hear the parties' positions and to determine how to proceed with the remand
16 from the District Court. At the Procedural Conference Qwest, Pac-West and the Commission's
17 Utilities Division ("Staff") appeared through counsel.

18 Pac-West's complaint against Qwest alleged that Qwest was not compensating Pac-West for
19 the termination of ISP-Bound traffic in accordance with the terms of an amendment to the parties'
20 Interconnection Agreement ("ICA"). The ICA amendment provided that ISP Bound traffic is as
21 described by the FCC in the *ISP Remand Order* and that "Qwest elects to exchange ISP-bound traffic
22 at the FCC ordered rates pursuant to the [ISP Remand Order]." Qwest was withholding reciprocal
23 compensation for VNXX traffic.

24 Pac-West offered VNXX service by assigning an area code and prefix (NPA-NXX) to its ISP
25 customer physically located outside the rate center associated with that number, with the effect that
26 customers of the ISP located within that rate center were able to call the ISP without incurring toll
27 charges.

28 Pac-West argued the ICA amendment applied to all ISP-Bound traffic and did not exempt

1 VNXX ISP-bound traffic. Qwest argued that VNXX traffic was not included within the traffic that
2 comprised the subject of the *ISP Remand Order*, and thus, the compensation scheme adopted by the
3 FCC in that order did not apply. In Decision No. 68820, the Commission found that it could not “say
4 that the ISP Remand Order is limited to ISPs with a server located in the same local calling area as
5 its customers” Decision No. 68820 at 8). The Commission concluded that the plain language of the
6 ISP Amendment provided for reciprocal compensation for all ISP-bound traffic, and did not exclude
7 VNXX ISP-bound traffic (Decision No. 68820 at 10). The Commission ordered Qwest to
8 compensate Pac-West for the ISP-bound traffic, including VNXX traffic. Qwest did compensation
9 Pac-West pursuant to the Commission’s order.

10 On appeal, the District Court found that only through a comprehensive review of the *ISP*
11 *Remand Order*, could it be determined whether the FCC intended to include VNXX traffic within the
12 compensation regime created by that order (Court Order at 11). After such review, the District Court
13 concluded that:

14 the FCC intended to remove ISP-bound traffic from the confines of §
15 251(b)(5), but only in regards to traffic that was subject to such reciprocal
16 payments before the issuance of the *ISP Remand Order*. Whether VNXX
17 traffic was among the calls subject to such reciprocal payments is not a
question that this Court can answer. Until such time that VNXX is
addressed by the ACC, the parties’ dispute cannot be resolved. Court
Order at 20.

18 The Court concluded that Decision No. 68820 fails “to properly interpret the *ISP Remand Order*,
19 which was fundamental to the ACC’s interpretation of the Pac-West ISP Amendment” (Court Order
20 at 21).

21 With respect to the relief Qwest sought, the District Court found: (1) the *ISP Remand Order*
22 prescribes intercarrier compensation only for calls placed by a caller to an ISP located in the same
23 local calling area; (2) it could not find that VNXX traffic is subject to access charges; and (3) that
24 where the Commission Decision conflicts with the language of the Court’s Order the Commission is
25 enjoined from enforcing the Decision (Court Order at 22). The Court held that neither Pac-West nor
26 Qwest could achieve the ultimate financial result either sought until the Commission definitively
27 categorizes VNXX (Court Order at 22). The Court instructed the Commission to determine the most
28 appropriate compensation regime for VNXX (*Id.*).

1 Qwest states that it recognizes that the District Court is leaving it to the Commission to
2 determine if VNXX traffic at the time the *ISP Remand Order* was issued was §251(b)(5) traffic
3 subject to reciprocal compensation or §251(g) traffic that would be subject to access charges. It
4 argued, however, that before the Commission does that, it must order Pac-West to return the
5 compensation that Qwest had paid to Pac-West pursuant to Decision No. 68820, or else the
6 Commission is violating the District Court's Order that enjoins the Commission from enforcing those
7 portions of the Decision that conflict with the District Court's Order. At the September 25, 2008,
8 Procedural Conference, Staff agreed with Pac-West's interpretation of the District Court's Order.

9 The District Court recognized that it cannot be determined which party prevails until the
10 Commission determines if VNXX traffic was §251(b)(5) or 251(g) traffic. The District Court did not
11 instruct the Commission to order the return of the monies paid to Pac-West. We believe that the
12 District Court was enjoining the Commission from taking further action on those portions of the
13 Decision that conflict with the District Court's findings. Thus, for example, the Commission could
14 not order Qwest to continue to make payments to Pac-West under the terms of the Decision.² The
15 ultimate issue remains to be decided by the Commission and we are establishing procedures to do so.
16 We cannot say at this point which party will prevail pending that determination, and we believe it
17 makes sense to maintain the current status quo pending such decision. Our determination of how
18 VNXX traffic should be compensated at the time the FCC issued its *ISP Remand Order* does not
19 interfere with the conduct of the generic VNXX docket, as the latter matter addresses the appropriate
20 compensation scheme for VNXX traffic on a going-forward basis.

21 Pac West argued that the ultimate issue of whether VNXX traffic is 251(b)(5) or 251(g) traffic
22 can be decided fairly quickly based on legal briefing (Pac-West Response at 4). Qwest believes that
23 resolution may involve issues of material fact (Qwest Reply at 6). We find that Qwest's suggestion
24 made at the September 25, 2008, Procedural Conference that the parties file position statements on
25 the issue(s) and whether they believe there are material issues of fact, to be followed by a subsequent
26 Procedural Conference, to be a reasonable recommendation and the most efficient approach.

27
28 ² Qwest is not making on-going payments to Pac-West pursuant to the ICA at issue in Decision No. 68820.

1 Consequently, we direct the parties and Staff to file a statement of the issue(s) they believe the
2 Commission must address pursuant to the Remand Order of the District Court, and whether they
3 believe there are material issues of fact that would require a hearing.

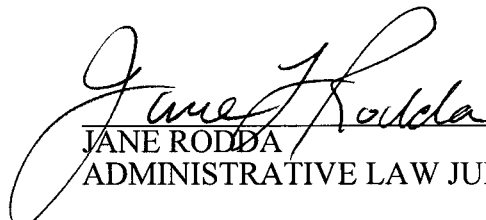
4 IT IS THEREFORE ORDERED that Qwest's Motion is denied.

5 IT IS FURTHER ORDERED that the parties and Staff shall **file position statements** on the
6 issue(s) they believe the Commission must address as a result of the District Court's remand in this
7 matter, including whether there are material issues of fact, by **November 10, 2008**.

8 IT IS FURTHER ORDERED that a **Procedural Conference** for the purpose of establishing
9 procedures and guidelines for resolving the issues shall commence on **November 17, 2008, at 11:00**
10 **a.m.**, or as soon thereafter as is practical, at the Commission's **Phoenix offices**, 1200 West
11 Washington, Phoenix, Arizona 85007.

12 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive
13 any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

14 Dated this 30th day of September, 2008

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17 
18 JANE RODDA
ADMINISTRATIVE LAW JUDGE

19 Copies of the foregoing mailed/delivered
this 30th day of September, 2008 to:

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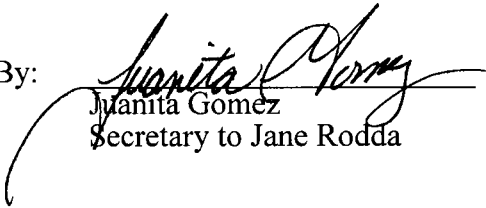
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